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# Revocation of Building Permits

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# With The Ohio Courts

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## EDITORIAL NOTES

### REVOCATION OF BUILDING PERMITS

The zoning case of *Cahn v. Guion*,<sup>1</sup> involves two questions, one of constitutional law and one of practice.

The plaintiff, Cahn, proposed to erect a number of apartment houses in a high-class residence district which at that time was free from apartment houses and in which the deed building restrictions were about to expire. He obtained building permits and was engaged in the making of arrangements and expenditures preparatory to the construction of the apartment buildings. Thereupon the city of Cleveland passed a stop-gap zoning ordinance, under which this particular section of the city fell within a single-family residence district. The ordinance was not the product of that type of careful survey and planning which forms one of the bases of the constitutionality of zoning and was frankly a stop-gap ordinance, based largely on the then existing developments in the various districts. The building commissioner proceeded toward the revocation of the building permits which he had issued. Both the issuance of the building permits and the proposed revocation antedated the taking effect of the stop-gap ordinance and, in fact, that ordinance had not gone into effect at the time of the litigation.

Cahn brought an action for a mandatory injunction, which could be expressed as an action to enjoin the revocation or as an action to compel the withdrawal of the revocation.

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<sup>1</sup>27 Ohio App. 141 (1928).

The court decided against the plaintiff. The constitutionality of zoning was assumed and there was no discussion as to any fundamental differentiation between a stop-gap and a final zoning ordinance. The main constitutional question discussed was whether a building permit creates a vested interest which cannot be taken away; in other words, whether it is constitutional, in effect, to legislate away a building permit after the same has been issued. The court held that no such vested interest was created, and this holding is unquestionably correct and in line with the weight of authority.

Indeed, there is considerable confusion in text books and decisions in the use of the expression "vested interest", the same being sometimes used as though the owner of a vested interest becomes completely immune from legislation. There is not and cannot be, in constitutional law, such a thing as a right to be free from the exercise of the police power. The power to legislate in the interest of public health, morals, convenience, order and welfare exists over all persons and property.<sup>2</sup> Every title to property is a vested interest, but subject to the police and other legislative powers nevertheless. To find that a building permit is a vested interest does not free it from the exercise of the police power; and zoning is admittedly an exercise of the police power. Even if a building permit were held to create a contract between the city and the recipient of the permit, that would not necessarily answer the question of the validity of an ordinance which in effect nullified the permit. For contracts, like other property rights, are subject to the police power.<sup>3</sup> But a building permit is not a contract. The leading case of *Brett v. Brookline*<sup>4</sup> held that zoning legislation may revoke permits even though building contracts had been made in reliance on the permit. The cases which limit the right of the municipality, in a zoning ordinance, to nullify building permits issued previous to the enactment of the ordinance, cannot be explained by any exact definition of vested interest or police power nor by any close reasoning from accepted principles of constitutional law.

Theoretically, as a building permit does not create a vested interest nor property right, no amount of expenditure in reliance

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<sup>2</sup>*Commonwealth v. Alger*, 7 Cush. (Mass.) 53 (1851).

<sup>3</sup>*Thorpe v. Railroad Co.*, 27 Vt. 140 (1855).

<sup>4</sup>250 Mass. 73, 145 N. E. 269 (1924).

on a building permit can create such a vested interest or property right as to effect a limitation upon the exercise of the police power. Practically, however, the actual decision in a litigated case will generally turn on questions of degree; and if substantial amounts of money and service have been expended after and in reliance upon the permit and while no litigation on the subject is pending or impending, and there has not been anything inequitable or unconscionable in the conduct of the permit holder, the court will be likely to find some way of producing an equitable result, whatever its view as to the technical nature of a building permit. The recent case of *Rice v. Van Vranken*,<sup>5</sup> holds that substantial construction on the land, not the permit, creates the vested interest. The constitution will be interpreted so as to enable the court to protect the permit-holder from too "raw a deal".

In the case under examination, the plaintiff brought an action which he called mandatory injunction and which the court felt justified in treating as an action in equity and one, consequently, which subjected the plaintiff to equity maxims and equitable considerations; and as the court felt that the plaintiff was seeking to exploit for his own profit a temporary situation in which a high-grade residential district was deprived of its protective restrictions, the court found in the facts a chancellor's justification for refusing equitable relief. If the plaintiff had permitted his building permits to be revoked and then applied for new permits before taking effect of the ordinance and then brought a mandamus action pure and simple, the decisive grounds of this decision would not have been available to the court, and the constitutionality of the stop-gap measure would have become the main and the unescapable issue.

The case presents nothing that is novel and represents simply one judge's way of helping to preserve a residential district until the legal arrangements for that preservation could be perfected.

ALFRED BETTMAN.

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<sup>5</sup>229 N. Y. Supp. 32 (1928).

## THE SCINTILLA RULE

The second paragraph of the syllabus and the opinion in the recent case of *Jacob Laub Baking Company v. Middleton*<sup>1</sup> support the contention advanced by Mr. Walter T. Kinder that the supreme court has abolished the scintilla rule.<sup>2</sup> Syllabus 2 follows:

"When the proof of the essential facts put in issue and the reasonable inferences deducible therefrom are such that the jury, as fair-minded men, should reasonably arrive at but one conclusion, it is the duty of the trial court to direct a verdict in favor of the party which such proof sustains."

The same language appears in the opinion<sup>3</sup> and immediately after it the following:

"If, on the other hand, the proof and inferences are such that fair-minded men could reasonably arrive at different conclusions therefrom, the facts in issue are triable to the jury."

The language quoted is not necessarily inconsistent with the scintilla rule as stated in the leading cases.<sup>4</sup> It can be reconciled therewith on the theory that there is not a scintilla of evidence unless the jury could reasonably find for the plaintiff. Such a reconciliation, however, would involve a stretching of the concept of scintilla.<sup>5</sup> Moreover, practically, the two statements will produce divergent results. The language quoted from *Jacob Laub Baking Company v. Middleton*, in which all concurred, will undoubtedly tend to increase the number of directed verdicts and appears to be, in effect, a repudiation of the scintilla rule.

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<sup>1</sup>118 Ohio St. 106 (1928).

<sup>2</sup>Kinder, *The Scintilla Rule—Should it be Abolished?* 26 OHIO L. BUL. AND REP. 190 (1928).

<sup>3</sup>*Supra*, n. 1., at p. 115.

<sup>4</sup>"Wherever there is any evidence, however slight, tending to prove the facts essential to make out a case for the plaintiff, a non-suit cannot be properly ordered; it is in no case a question as to the weight, but as to the relevancy of the testimony." *Ellis & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628, 647 (1855); *Gibbs v. Village of Girard*, 88 Ohio St. 34, 41, 43, 108 N. E. 299 (1913).

<sup>5</sup>"A 'scintilla' is defined as 'an iota, a tittle, a glimmer, a trace, a minute particle, an atom'." Kinder, *op. cit.*, *supra*, note 2, at p. 193.

In view of this most recent expression of the court and of its position as indicated in the opinions in other recent cases,<sup>6</sup> it would seem reasonably clear that the supreme court has turned its back on the scintilla rule were it not for *St. Mary's Gas Co. v. Brodbeck*,<sup>7</sup> in which Chief Justice Marshall, writing the opinion, in which all concurred, said that "the well-known scintilla rule \* \* \* must be applied and respected by courts, regardless of their belief in the soundness of the rule."

The contrariety thus apparent makes an early and authoritative disposition of the question more than desirable. The scintilla rule is considered out-of-date and unsatisfactory by legal scholars, has been abandoned by most courts, and subjected to attack at intervals even by our own courts.<sup>8</sup>

The mental processes of a court in deciding whether to direct a verdict cannot be articulated, nor can a formula be invented which will provide more than a clue.<sup>9</sup> In any case, the judge must rely almost exclusively upon his "trained intuition"<sup>10</sup> and the result will be the same in most cases regardless of the formula made use of.<sup>11</sup> The vice of the scintilla rule is two-fold: (1) it excites in the scrupulous judge a paralyzing fear of erring on the wrong side; (2) it furnishes an excuse for the weak judge to "pass the buck". In both ways it encourages unmeritorious litigation. It is to be hoped, therefore, that the supreme court will expressly abandon it.

A recognition of the limitations of any test or formula that may be adopted does not mean that no formula is necessary or desirable.<sup>12</sup> Many tests have been proposed.<sup>13</sup> Dean Wigmore considers the following most satisfactory:<sup>14</sup>

<sup>6</sup>*Cleveland-Akron Bag Co. v. Jaite*, 112 Ohio St. 506, 148 N. E. 82 (1925); *Buell v. New York Central R. R. Co.*, 114 Ohio St. 40, 150 N. E. 422 (1926); *Detroit, T. & I. R. R. Co. v. Rohrs*, 114 Ohio St. 493, 151 N. E. 714 (1926).

<sup>7</sup>114 Ohio St. 423, 429, 151 N. E. 323 (1926).

<sup>8</sup>Authorities are collected in the opinion in *Cleveland-Akron Bag Co. v. Jaite*, *supra*, note 6, and in Mr. Kinder's paper, *supra*, note 2.

<sup>9</sup>*Green, The Negligence Issue*, 37 Y. L. J., 1029, 1034 (1928), note 15 Cf. CARDOZO, *THE GROWTH OF THE LAW* (1924) Ch. IV.

<sup>10</sup>Cf. Pound, *The Theory of Judicial Decision*, 36 H. L. R. 940, 951, 952 (1923).

<sup>11</sup>Cf. Rosenbaum and Lilienthal, *Court Review of Orders of the Ohio Public Utilities Commission*, 2 CIN. L. REV. 225, 251-253 (1928); Sturges and Clark, *Legal Theory and Real Property Mortgages*, 37 Y. L. J. 691, 704 *et seq.* (1928).

<sup>12</sup>*Green, op. cit.*, *supra*, note 9, at p. 1031.

<sup>13</sup>5 Wigmore, *EVIDENCE* (2nd ed. 1923) 458, n. 13.

<sup>14</sup>5 *Ibid.*, note 13, at p. 459.

"(The proposition) cannot merely be, Is there evidence? \* \* \* The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question."

But this rather evades than meets the issue. The standard of third party judgment ignores the fact that a man has only his own mental equipment to think with. He cannot call upon the intelligence of some hypothetical mentality. If he is able to say that an intelligent man could reasonably think this or that it is because he himself considers it reasonable. His judgment is his own.<sup>15</sup> The language quoted from *Jacob Laub Baking Company v. Middleton* is open to this criticism.

Mr. Kinder takes it for granted that the abandonment of the scintilla rule means *ipso facto* the adoption of the federal rule.<sup>16</sup> This rule<sup>17</sup> has been criticised by Dean Wigmore,<sup>18</sup> and it would seem justly so. Whatever its merits or demerits, its adoption in this state would amount to a judicial repeal of section 11577 of the General Code, which provides that a verdict cannot be set aside more than once on the weight of the evidence.<sup>19</sup> If the test be the same on a motion for a directed verdict as on a motion for a new trial, then a court, having set aside a verdict, if not bound to enter judgment for the defendant forthwith, would at least be

<sup>15</sup> Cf. Green, *op. cit.*, *supra*, note 9, at pp. 1043, 1044.

<sup>16</sup> Kinder, *op. cit.*, *supra*, note 2, at p. 204.

<sup>17</sup> " \* \* many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding." *Baltimore and Ohio R. R. v. Groeger*, 266 U. S. 520, 524 (1925).

<sup>18</sup> "In some courts it is said that the test for the ruling is the same as it would be on a motion after verdict to set aside the verdict as being against the overwhelming weight of evidence. Even if this were so, it would not afford any more concrete and tangible guide. But it seems unsound, on principle, to assert such an identity, for two reasons—in the first place, because the mass of evidence in the two situations is very different (for after verdict the defendant's evidence has to be considered with the rest), and in the next place, because the setting aside of a verdict leads merely to a new trial, while the ruling of insufficiency leads usually to the direction of a verdict for the opponent, and therefore a total quantity of the proponents evidence which would justify the former might be more than would justify the latter." 5 Wigmore, *op. cit.*, *supra*, note 13, at pp. 458, 459.

<sup>19</sup> *Cleveland Ry. Co. v. Trendel*, 101 Ohio St. 316, 128 N. E. 136 (1920); *Rolf v. Heil*, 113 Ohio St. 113, 148 N. E. 398 (1925).

compelled, on a retrial, in the absence of additional evidence, to direct a verdict, thus depriving the plaintiff of the benefit of the statute.<sup>20</sup>

Consideration of any question leads the human mind either to certainty or to an opinion, or leaves it in doubt.<sup>21</sup> In the case of the last state of mind the jury will get the case no matter what formula is adopted. If the first prevail there will be an instructed verdict under any test. The cases in which a test or formula will have any potency are those in which the judge's mind has gotten beyond doubt but not reached certainty, which he will seldom, if ever, attain—that is, those cases in which he has formed an opinion. Now an opinion may be strong or it may be weak, and there are unnumbered shades and degrees of both kinds. On one side opinion merges into certainty, on the other side into doubt. The event in any case will, in fact, depend upon the strength of the judge's opinion. But the shades and degrees of opinion have no names; they cannot be articulated. Hence it is manifestly impossible to determine even approximately how strong his opinion must be. Nevertheless, it must be stronger than is required to set aside a verdict; otherwise section 11577 is rendered meaningless.

The problem, therefore, is to devise a formula which, while meeting the objections to the scintilla rule, will put the judge on notice that a greater degree of assurance is required to direct a verdict than to set one aside. More than this we cannot hope to accomplish. No formula can do more than serve as a caution.<sup>22</sup>

The test indicated by the opinions in two other recent cases<sup>23</sup> may be stated as follows: A verdict should be directed if the only reasonable conclusion as to the facts is adverse to the plaintiff on any material issue. This is objectionable on the grounds set out in the preceding paragraph. It does not sufficiently put the judge on notice that a stronger opinion is required to direct a verdict than to set a verdict aside.<sup>24</sup>

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<sup>20</sup>*Ellis & Morton v. Ohio Life Ins. & Trust Co.*, *supra*, note 4, at p. 647. *Cf. Klass v. Klass*, 27 Ohio App. 459 (1928).

<sup>21</sup>1 *COFFEY*, *EPISTEMOLOGY*, 32, 33. *Cf. NEWMAN*, *GRAMMAR OF ASSENT*, 5.

<sup>22</sup>*Cf. Green, op. cit.*, *supra*, note 9, at p. 1041.

<sup>23</sup>*Buell v. New York Central R. R. Co.*, and *Detroit, T. & I. R. R. Co. v. Rohrs*, *supra*, note 6.

<sup>24</sup>"It is only where a verdict is palpably against the evidence, or the decided weight of it, that courts are warranted in interfering to set it aside, in order to



How then should the test be formulated? The following is proposed: A verdict should be directed whenever, in the opinion of the court, the conclusion as to the facts on any material issue is against the plaintiff beyond a reasonable doubt.<sup>25</sup>

This would indicate, in so far as it seems possible to do so, that a greater degree of assurance is required than is necessary to set aside a verdict. Yet it is not a mere re-statement of the scintilla rule. Holding that the conclusion is against the plaintiff beyond a reasonable doubt is not inconsistent with recognizing that there is "some evidence, however slight". The proposed test is not inconsistent with the most recent expressions of the supreme court and accords with actual judicial practice except in those cases in which the judge is led, either through scrupulosity or a desire to avoid responsibility, to surrender to the jury the judicial function. Finally, it would not lend itself to this abuse, which the scintilla rule invites.

JOSEPH O'MEARA, JR.

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send the cause to another trial." *Webb v. Protection Insurance Co.*, 6 Ohio 456, 472 (1834). "We cannot disturb a finding of fact made by the jury, unless the verdict is clearly and manifestly not sustained by sufficient evidence." *Livingstone & Co. v. Streeter*, 114 Ohio St. 144, 147, 150 N. E. 734 (1926).

<sup>25</sup>It may be objected that "reasonable doubt" should be defined, but attempts at definition tend rather to confuse than to enlighten, for every defining term must itself be defined, so that the matter tends to become one of mere words. Cf. 5 WIGMORE, *op. cit.*, *supra*, note 13, at pp. 465-469.